

**Sealy Mattress Company of Michigan, Inc. and  
United Steelworkers of America, AFL-CIO-  
CLC. Case 7-CA-18882**

June 10, 1982

**DECISION AND ORDER**

**BY CHAIRMAN VAN DE WATER AND  
MEMBERS JENKINS AND HUNTER**

On December 22, 1981, Administrative Law Judge Norman Zankel issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief, and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions of the Administrative Law Judge only to the extent consistent herewith.

Although we agree with the Administrative Law Judge that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Titus Logan for his union activity, we do so only for the reasons that follow.

Respondent and the Union have maintained a relatively peaceful collective-bargaining relationship since 1964. Over this period of time the bargaining unit description has consisted of all full- and part-time hourly rated production and maintenance employees in the plant, but excluding supervisory, office, cutter foremen, and plant protection employees. The classification of sewing machine repair mechanic (mechanic herein), which has existed for approximately 40 years, has never been subject to a collective-bargaining agreement between the parties.

On February 18, 1980,<sup>2</sup> Titus Logan, whom Respondent knew to have no experience as a sewing machine repairman, was hired to work as a mechanic. Respondent decided that Logan would assist mechanic W. McMullen, and then replace him upon his upcoming retirement.

In early September, employee and Union President Ralph Duncans spoke to Plant Manager Ein-

haus about getting mechanics included in the bargaining unit. Einhaus, objecting to this suggestion, referred to the historical exclusion of mechanics from the unit and added that "you're going to hurt somebody if you pursue it." At approximately the same time, Logan inquired of Delia Stamper, a union committeeperson, why he (Logan) was not in the unit and whether or not he could "join." After checking with the Union's International office, Stamper informed Logan that he was eligible for inclusion in the bargaining unit and she suggested he sign a union card. Logan soon signed a union dues-checkoff authorization card.

About a week later, Duncans and Eddie Smith, the Union's vice president and also an employee of Respondent, visited Einhaus in his office. Smith presented Einhaus with Logan's authorization card and told Einhaus he wanted Logan in the Union. Duncans and Smith stated that Einhaus then remarked that if Logan joined the Union or signed an authorization card he would be "fired." Einhaus testified that he told them that mechanics could not be part of the bargaining unit and that Logan "would be fired as a mechanic in the bargaining unit." The Administrative Law Judge found no substantive difference in the two versions of the conversation.

Einhaus then stated that mechanics were managerial employees, having previously told Duncans that mechanics were salaried, and therefore part of management. Duncans replied that he knew Logan was hourly paid from having examined his timecard. Einhaus became quite agitated and told Duncans that looking at Logan's timecard was improper. Subsequent to Logan's layoff Respondent converted the remaining mechanics from hourly to salaried personnel.<sup>3</sup>

About 1 to 2 weeks following the above conversation, on October 7, Logan, along with 10 production employees, was given a written notice of layoff, which stated that the work force was being reduced due to lack of production. When Logan asked Supervisor Robson if that was the true reason for his layoff, Robson replied affirmatively. Indeed, Logan had never been told that his performance was unsatisfactory and no supervisor had ever discussed the quality of his work with him. Yet, Einhaus testified that Respondent's actual reason for terminating Logan was that his work performance had been consistently poor over the entire period of his employment. It is undisputed, however, that when McMullen retired in late June, Logan approached Einhaus and Robson and said he was concerned about the fact that he was then

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In ordering reinstatement and backpay for Titus Logan, we note that Respondent's June 17, 1981, offer of reinstatement was not an offer to reinstate Logan to a substantially equivalent position.

<sup>2</sup> All dates herein are in 1980, unless otherwise indicated.

<sup>3</sup> Wayne Thomas had been hired as a mechanic on August 18.

the only full-time mechanic. Einhaus expressed confidence in Logan and told him that he planned to "stick with" him as a mechanic, but would try to hire an additional mechanic on a full-time basis. This conversation took place only 3 months before Logan manifested an interest in joining the Union. There is no evidence that Logan's work performance in any way deteriorated during the intervening period. Respondent's position further loses credibility when one considers that, while Respondent insists that Logan's work was substandard throughout his employment, he was fired only 1 to 2 weeks after he expressed his desire to join the Union.

Furthermore, the most convincing evidence of Respondent's unlawful motive is Einhaus' statement to Duncans and Smith that Logan would be fired if he attempted to join the Union.<sup>4</sup> That statement was not mitigated by Einhaus' claim that he was merely conveying Respondent's position on the historical exclusion of mechanics from the unit, nor was the statement merely an explanation of why Respondent was rejecting Logan's authorization card. Rather, it served notice that the employee's exercise of his Section 7 rights to seek inclusion in a bargaining unit would result in his discharge. Even if it could be determined that Logan was not properly a part of the unit he sought to join, his efforts were protected activity against which Respondent could not lawfully retaliate. *Rolligon Corporation*, 254 NLRB 22 (1981). In his conversation with Smith and Duncans, Einhaus outlined the action he planned to take against Logan and then proceeded to carry out that action. For these reasons, we find that Respondent's discharge of Titus Logan violated Section 8(a)(3) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. Sealy Mattress Company of Michigan, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent discharged employee Titus Logan in violation of Section 8(a)(3) and (1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent violated Section 8(a)(3) and (1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Titus Logan was unlawfully terminated on October 7, 1980, we shall order Respondent to offer him full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges, and to make him whole for any loss of earnings he suffered as a result of Respondent's unlawful actions. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest computed in the manner and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>5</sup>

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Sealy Mattress Company of Michigan, Inc., Taylor, Michigan, its officers, agents, successors, and assigns, shall:

##### 1. Cease and desist from:

- (a) Discharging any of its employees because they engage in union activities.
- (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

##### 2. Take the following affirmative action:

- (a) Offer Titus Logan immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights or privileges previously enjoyed.
- (b) Make Titus Logan whole for any loss of earnings he may have suffered due to the discrimination practiced against him by paying him a sum equal to what he would have earned, in the manner prescribed in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the

<sup>4</sup> No exceptions were filed to the Administrative Law Judge's conclusion that this statement was not violative of Sec. 8(a)(1); hence we adopt it *pro forma*.

<sup>5</sup> In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

amount of backpay due under the terms of this Order.

(d) Post at its Taylor, Michigan, facility copies of the attached notice marked "Appendix."<sup>6</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>6</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT discharge employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act.

WE WILL offer Titus Logan immediate and full reinstatement to his former position as sewing machine repair mechanic in our Taylor, Michigan, location or, if that position no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Titus Logan whole, with interest, for all loss of earnings resulting from his discharge.

SEALY MATTRESS COMPANY OF  
MICHIGAN, INC.

## DECISION

### STATEMENT OF THE CASE

NORMAN ZANKEL, Administrative Law Judge: This case was heard before me on August 4, and 5, 1981, in Detroit, Michigan.

Upon an original charge filed by United Steelworkers of America, AFL-CIO-CLC (the Union) on February 3, 1981, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing on March 17, 1981, against Sealy Mattress Company of Michigan, Inc. (the Employer).

In essence, the complaint alleges the Employer interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (the Act), in September 1980,<sup>1</sup> by threatening to discharge sewing machine repair employees "if they signed union authorization and/or dues checkoff authorization cards."

Also, the complaint alleges the Employer discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act when it laid off its employee, Titus Logan, on October 7, 1980, because "he sought membership in, or to be represented by the Union."

The Employer filed a timely answer which admitted certain matters but denied the substantive allegations and that it had committed any unfair labor practices.

All parties appeared at the hearing. Each was represented by counsel and was afforded full opportunity to be heard, to introduce and meet material evidence, to examine and cross-examine witnesses, to present oral argument, and to file briefs. Counsel for the General Counsel and the Employer's counsel submitted post-trial briefs, the contents of which have been carefully considered.

Upon consideration of the entire record, the briefs and my observation of the witnesses and their demeanor, I make the following:

## FINDINGS AND CONCLUSIONS

### 1. JURISDICTION

Jurisdiction is uncontested. The Employer is a Michigan corporation engaged in the manufacture, nonretail sale and distribution of bedding and related products within Michigan and other States.

During the calendar year immediately preceding issuance of the complaint, a representative period, the Employer purchased and caused to be transported and delivered to its Taylor facility goods and materials valued in excess of \$100,000, of which goods and materials exceeding \$50,000 in value were transported and delivered to that facility directly from points located outside the State of Michigan.

The Employer admits, the record reflects, and I find it is and, at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Employer operates other facilities within Michigan. Only the facility located at 21450 Trolley Industrial Drive, Taylor, Michigan, is involved in this case.

The Employer admits, the record reflects, and I find the Union is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates hereinafter are 1980 unless otherwise stated.

## II. THE ALLEGED UNFAIR LABOR PRACTICES

The recitation of the facts found below is based on a composite of the credited aspects of the testimony of all witnesses, unrefuted oral testimony, supporting documents, undisputed evidence, and careful consideration of the logical consistency and inherent probability of events.

Not every bit of evidence, or every argument of counsel, is discussed. Nonetheless, I have considered all such matters. Omitted matter is considered irrelevant or superfluous. To the extent that testimony or other evidence not mentioned might appear to contradict the findings of fact, that evidence has not been overlooked. Instead, it has been rejected as incredible or of little probative worth. *Bishop and Maclo, Inc.*, 159 NLRB 1159, 1161 (1966).

My credibility resolutions, wherever necessary, have been based on my observation of witness demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. *Northridge Knitting Mills, Inc.*, 223 NLRB 230 (1976); *Warren L. Rose Casting, Inc. d/b/a V & W Castings*, 231 NLRB 912 (1977); *Gold Standard Enterprises, Inc., Gold Standard Liquor Store at Ridge Avenue; Chalet Wine and Cheese Shops, Ltd. at Fullerton Avenue; Chalet Wine and Cheese Shops, Ltd. at Highland Park*, 234 NLRB 618 (1978).

### A. Background

The Employer produces mattresses and related items at the Taylor, Michigan, facility. The relevant supervisory hierarchy at that location consists of: A. Bart Lewis, executive vice president and legal counsel; John Einhaus, plant manager; Bill Robson, supervisor; and Phyllis Eskew, cutting and sewing department supervisor.

Since at least 1964, the Employer and the Union have maintained a contractual collective-bargaining relationship. That relationship was comparatively uneventful. Thus, only one-half day was lost due to a work stoppage because of delay in distribution of paychecks; no grievance resolution ever required arbitration; and only a single unfair labor practice charge, which the Union withdrew, had been filed with the Board.

Successive collective-bargaining agreements have been negotiated. The bargaining unit description has remained constant. The unit is described as follows in the most recent collective-bargaining agreement:<sup>2</sup>

### ARTICLE II,

*Section 2. BARGAINING UNIT:* The COMPANY recognizes the UNION as the sole bargaining agent in the matter of wages, hours, and all other working conditions for all full-time and all part-time hourly rated production and maintenance employees in the plant, but excluding supervisory, office, cutter foremen and plant protection employees.

<sup>2</sup> Effective October 1, 1978, through September 30, 1981.

For approximately 40 years, there existed a job classification identified as sewing machine repair mechanic (hereinafter called mechanic). That classification never had been incorporated into any collective-bargaining agreement between the parties—either as a “production” or “maintenance” position.

There is plethora of evidence by which the Employer sought to show that mechanics historically had been excluded by mutual agreement. There is also some evidence which shows that union representatives questioned the status of certain incumbents in that position. Nevertheless, the Union took no formal action in this matter until the events germane to this proceeding. Thus, I find that the Union did not object to the exclusion of mechanics from the unit until the activity which underlies the instant case.

Historically, the mechanics’ job was staffed as follows. Prior to 1964 and until 1968, the Employer had one mechanic, Ed Clayton. He performed all repair and maintenance work on the sewing machines and other machinery throughout his employment.

In 1968, the Employer added another mechanic, Vern Griffin. Previously a bargaining unit employee, Griffin, resigned his unit position to become a mechanic. In May 1980, Griffin was terminated for unsatisfactory work. The termination was recorded as a layoff.<sup>3</sup> However, Griffin had been orally informed that he was being discharged.

In 1976, W. McMullen began work as a mechanic. He worked in that job until he retired in June 1980.

Logan was hired to work as a mechanic on February 18, 1980. He had no prior experience as a sewing machine repairman. Einhaus, who interviewed Logan, was fully apprised of Logan’s inexperience. Thus, Logan was assigned to assist McMullen. It was anticipated that Logan would replace McMullen upon the latter’s forthcoming retirement.

During March, the Employer sent Logan to Chicago to participate in a 3-day training program. There, Logan received some training in basic skills of repair and operation of sewing machines. It appears that Logan received training in only one of the ten or so types of sewing equipment used at the Taylor facility.

### B. The Present Dispute

#### 1. The threat

##### a. The facts

At times material herein, Ralph Duncans and Eddie Smith, both employees of the Employer, were the Union’s president and vice president, respectively.

In August or early September 1980, Smith asked Einhaus whether employees Raines and Thomas who performed mechanics’ work were hourly or salaried employees. Einhaus told Smith that Raines and Thomas were salaried. In fact, each was hourly paid.<sup>4</sup>

<sup>3</sup> This procedure permitted V. Griffin to qualify for unemployment compensation benefits.

<sup>4</sup> This inconsistency derives from the Employer’s alteration in mode of compensation. (See Jt. Exh. 2.)

In early September, Duncans spoke with Einhaus regarding the unit scope. According to Einhaus, Duncans said, "this was the time that he (Duncans) was going to get me, and the maintenance men were going to be part of the bargaining unit."<sup>5</sup> Einhaus responded that the Employer's position on that issue was well known and that, "You're going to hurt somebody if you pursue it."<sup>6</sup>

Coincidental to the activity of Duncans and Smith, Logan asked employee Delia Stamper, a union committeeperson, why he (Logan) was not in the unit. He asked whether he could "join." Stamper did not have a ready answer. Stamper ascertained Logan was hourly paid. Stamper told Logan the question would be put to the Union's international level.

Some time later, Stamper told Logan that the International and she agreed he was eligible for inclusion in the bargaining unit. Stamper advised Logan to sign a union card.

Shortly thereafter, Smith gave Logan a union dues-checkoff authorization card. Logan signed the card.<sup>7</sup>

Smith immediately took the card containing Logan's signature to a payroll clerk. The card was not accepted, apparently in accordance with the historical exclusion of mechanic from the unit.

That same day, within 1 week after Duncans made his oral claim to Einhaus (as described above) in early September for inclusion of mechanics in the unit, Smith and Duncans visited Einhaus in the latter's office. Einhaus, Duncans, and Smith testified regarding that conference. The narration of each is not *in haec verba* like that of any other participant. Nonetheless, I find the variations present no serious credibility problem. Thus, what follows immediately below (except for the quoted language) is a composite of all versions.

On entering Einhaus' office, Smith laid Logan's authorization card on Einhaus' desk. Smith told Einhaus he had signed (or wanted) Logan in the Union. Duncans and Smith testified that Einhaus said Logan would be fired if he joined the Union or put his name on the card. Einhaus testified that he told Smith and Duncans that:

[They] know the understanding we have that Mechanics cannot be part of the bargaining unit. We have discussed this many many times before, and you know he [Logan] would be fired if he became a mechanic in the bargaining unit. If he [Logan] wanted to be a production employee in this bargaining unit, fine. But he could not be a Mechanic. [Emphasis supplied.]

Einhaus testified, and Smith and Duncans agreed, that Smith walked out of the meeting, in Einhaus' words "after I told him [Smith] he [Logan] would be fired as a

mechanic in the bargaining unit. . . ." (Emphasis supplied.)

Duncans and Einhaus continued their conversation. Duncans opined Logan probably should be included in the unit as a maintenance employee. Duncans said if Logan were fired, the Union would "take steps to rectify" the situation. Einhaus asserted that maintenance employees had been continuously considered part of management. He told Duncans the Union could do what it has to and the Employer would do what it has to do.

Duncans persisted in his argument. He claimed Logan could not be management because he was hourly paid. Duncans revealed he learned that fact by having looked at Logan's timecard. Einhaus accused Duncans of improper conduct in looking at the timecard. Einhaus said that Logan's pay status was none of Duncans' business. The conversation ended at that point. Duncans took Logan's authorization card from Einhaus' desk. At no time during the discussion among Einhaus, Duncans, and Smith did Einhaus touch or read the card.

Later that day, Einhaus told Lewis and Robson of the attempt to have Logan included in the unit.

#### b. Analysis

The General Counsel asserts that Einhaus' mid-September remark to Duncans and Smith that the effort to have Logan included within the bargaining unit would result in his termination constitutes the unlawful threat alleged in complaint paragraph 8(a).

The Employer contends Einhaus' statement is not unlawful. The Employer argues Einhaus' words are a "statement of fact" which reflects the status of Logan's job classification as outside the bargaining unit. As such, the Employer maintains Einhaus' comments do not transgress the Board's standards for assessing whether statements violate Section 8(a)(1) of the Act.

If remarks possess a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their statutory rights, they are violative of Section 8(a)(1). *Keystone Pretzel Bakery, Inc.*, 242 NLRB 492 (1979), citing *Hanes Hosiery, Inc.*, 219 NLRB 338 (1975).

The instant issue presents a close question. Its resolution is not free from doubt. The particular circumstances of this case persuade me that Einhaus' statement is not violative of Section 8(a)(1).

It is virtually conceded that Smith and Duncans confronted Einhaus with a request that Logan be included in the bargaining unit. Einhaus' testimony reflects he rejected such a move. All witnesses who testified concerning the relevant conversation agreed that Einhaus said Logan could not become a unit employee.<sup>8</sup>

Counsel for the General Counsel argues that Einhaus' statement is tantamount to a declaration that the effort to have Logan included in the unit was inconsistent with Logan's continued employment. Viewed in isolation, I could agree. However, the surrounding circumstances suggest a different result.

<sup>5</sup> The Employer agrees Duncans announced that henceforth the Union would contend that the mechanics should be included in the bargaining unit.

<sup>6</sup> This quoted comment of Einhaus is not alleged as an unfair labor practice. The allusion to the Employer's position refers to the historical exclusion of mechanical from the unit.

<sup>7</sup> The reverse side of the card contained a membership application and bargaining authorization language. It is unclear whether Logan signed both sides of the card. The original card containing Logan's signature was misplaced. It was not available at the hearing.

<sup>8</sup> In this conclusion, it is clear that Smith's statement that he signed Logan in the Union is not an expression of art.

September—\$1,175.00

October 3-7—\$155.00

Meanwhile, Logan credibly testified that shortly after McMullen retired he [Logan] spoke with Einhaus about the mechanics' job. Robson was present. Logan's uncontradicted testimony reflects he expressed concern to Einhaus that he was then the only mechanic. Logan asked what Einhaus had planned for repairing the machinery. Logan testified Einhaus said he would "stick with" Logan and also was "trying to get someone else in there on a full-time basis."

Logan's testimony and records (Resp. Exh. 2) in evidence, in combination, show that from April until McMullen retired, D. Griffin worked less frequently than after McMullen retired and, according to Logan, when he and McMullen were "behind in their repair work," D. Griffin worked a regular schedule of 2 days per week after McMullen retired.

During July and August, Lewis directed Einhaus to conduct the sewing machine repair work either with the Employer's own full-time employees or by using outside independent contractors. In-house mechanics were the least costly to the Employer.

As a result of newspaper advertisements, Wayne Thomas was hired as a mechanic on August 18.

Apparently, Thomas did not perform repair work on the machines which had been Logan's duty to repair. Indeed, Eskew testified that Thomas performed other types of work; namely, construction. Thus, Thomas' acquisition as a Mechanic did not reduce the frequency of D. Griffin's regular performance of repair work during September. D. Griffin's invoices show he worked for the Employer on September 2, 4, 9, 11, 16, 18, 23, 25, and 30. In October, before Logan's termination, D. Griffin worked with the same regularity. After Logan's termination, D. Griffin increased his weekly work for the Employer from 2 to 3 days per week.

After Logan's termination, the Employer once again advertised for a full-time mechanic. On November 3, Mark Devine was hired to fill that position. At that point, Thomas and Devine were full-time mechanics. The services of D. Griffin were eliminated. The record shows D. Griffin ended his regular repair work on November 4.<sup>13</sup>

In early September, Lewis testified he again questioned the continuation of D. Griffin's services. He testified Logan's job performance was also discussed. It is apparent no immediate decision was made regarding Logan's employment. Einhaus claimed he pleaded for more time in which Logan might improve his work. Lewis and Einhaus also claimed they concluded there was a need to layoff some production employees in the near future. Apparently, no specific plans were made for those layoffs.

On an unspecified date late in September, a layoff date of October 7 was established. Simultaneously, Lewis decided Logan should be terminated. According to both

Lewis and Einhaus, the decision to terminate was based solely on Logan's poor job performance.<sup>14</sup>

Finally, the record shows that Thomas, Devine, and Mechanic/Supervisor J. Raines were converted from hourly to salary paid, effective November 7. Lewis testified the change had been made to conform the method of remuneration for mechanics to the Employer's historical contention that the job classification was a managerial position.

#### b. Analysis

The General Counsel contends this is not a so-called *Wright Line*, a *Division Wright Line, Inc.*, case (251 NLRB 1083 (1980)).

The Employer maintains "the instant matter is a classic 'Dual Motive' case. . . ."

I agree with the General Counsel. I conclude there is no merit to the contention that Logan's termination was caused by unsatisfactory job performance. The defense is pretextual. These conclusions, however, do not significantly affect the analytical process required to resolve the issue of discrimination. *Guerdon Industries*, 255 NLRB 610 (1981); *Limestone Apparel Corp.*, 255 NLRB 722 (1981); *Castle Instant Maintenance/Maid, Inc.*, 256 NLRB 130 (1981).

#### 1. The General Counsel's *prima facie* case

The General Counsel must prove certain elements to establish a *prima facie* case of discrimination. Those elements are (1) that the affected employee had engaged in activity protected by the Act; (2) that the employer had knowledge of that activity; (3) the adverse personnel action imposed on the employee was motivated by anti-union animus, and (4) that the employer's action had the effect of encouraging or discouraging membership in a labor organization. The General Counsel has the burden of proving his *prima facie* case by a preponderance of the evidence. *Gonic Manufacturing Company, Division of Hampshire Woolen Company*, 141 NLRB 201, 209 (1963).

I find all elements of a *prima facie* case of an 8(a)(3) violation present herein, as follows:

**A. Protected activity:** Whether viewed as an effort to join the *unit* or *Union*, Logan's completion of the check-off authorization card, and Duncans' and Smith's confrontation with Einhaus regarding the card, clearly constitute activities protected by Section 7 of the Act.

For purposes of the 8(a)(3) allegation, the bargaining history indicating the mechanic's job was not within the unit is irrelevant. In *Howell Metal Company*, 243 NLRB 1136, 1139 (1979), the Board left undisturbed Administrative Law Judge Claude R. Wolfe's observation that unit placement of an individual does not affect the applicability of the Act's protection. In *Howell*, the employer withheld work opportunities from an employee because he had become active in a union organizing campaign among production and maintenance employees. Argu-

<sup>13</sup> Lewis claimed, without contradiction, that D. Griffin's services were not used after that date.

<sup>14</sup> It is conceded that the decision to terminate Logan was made at least 2 weeks after the effort of Smith and Duncans to have Logan included in the bargaining unit.

The Board has held that Employer statements which convey a "clear message that support for a union and continued employment are incompatible," violate Section 8(a)(1). *Rolligon Corporation*, 254 NLRB 22 (1981), cited by the General Counsel. In that case, an assembled group of employees were told that employees who are unhappy and would rather work in a union shop would do that employer a great service by finding a job elsewhere. The Board held such a statement coercive "because it conveys the clear message that support for the Union and continued employment by . . . (the employer) are incompatible."

In my view, the *Rolligon* case is materially distinguishable from the case at bar. The contexts are substantially different. In *Rolligon*, the unlawful remark was made in response to, and in the midst of, an organizational campaign. It was uttered as part of a speech in which the employer expressed his opposition to unionization. In that framework, it is reasonable the Board should have concluded the potentially unlawful statement reasonably possessed a tendency to deliver the proscribed message that a vote for the Union conceivably jeopardized one's job.

Herein, Einhaus made his comment to Duncans and Smith when no representation campaign was in progress. Indeed, there was a longstanding bargaining history between the parties which was relatively free from strife.

Moreover, the complete text of Einhaus' remarks to Duncans and Smith do not reflect the hostility toward unions present in *Rolligon*. I credit Einhaus' testimony that he, in effect, told Duncans and Smith that he had no objection to Logan becoming a union member.<sup>9</sup>

Other relevant Board precedent also is materially distinguishable. Specifically, the cases of *Padre Dodge*, 205 NLRB 252 (1973); *Gem Knits, Inc.*, 174 NLRB 449, 453 (1969); *Ramar Dress Corp.*, 175 NLRB 320, 327 (1969); *726 Seventeenth Inc., t/a Sans Souci Restaurant*, 235 NLRB 604, 605-606 (1978); and *Intertherm, Inc.*, 235 NLRB 693, fn. 6 (1978), were each decided in the context of a union representation campaign. In each case, the alleged unlawful remarks had been addressed to known union organizers, instigators, and activists.

None of the above-cited cases involved a statement identical to that made by Einhaus. Thus, in *Padre Dodge*, a supervisor asked a union organizer why he continued with his employment if he was not happy on the job; in *Gem Knits*, employee instigators of union activity were asked why they stayed on the job if they did not like the work; in *Ramar Dress*, employees were told to go to work in a union shop if they wanted a union; in *Sans Souci*, employees were told that those who favored a union should seek employment elsewhere; and in *Intertherm*, an employee was told that if he was not happy with the Company, he should look somewhere else for a job.

In an organizational context, the statements found unlawful in the cited cases impliedly threaten employees with job loss. Arguably, Einhaus' remarks, if interpreted literally, have the same effect. However, I conclude the historical relationship between the Employer and the

Union, coupled with Einhaus' acknowledgment (made simultaneously with the alleged threat) of Logan's right to become a union member effectively removes his statement from the ambit of the Board's standards for determining whether statements are violative of Section 8(a)(1) of the Act.

Upon all the foregoing, I conclude there is no merit to the allegations contained in paragraph 8(a) of the complaint.

## 2. The discrimination

### (a) *The facts*

Logan's employment as a mechanic ended on October 7, 1980. On that day, Robson handed Logan a written notice of layoff.<sup>10</sup>

All layoff notices expressly stated the reason for the action as follows: "A reduction in production requirements compels a reduction to our work force."

Logan testified, without contradiction,<sup>11</sup> that he confronted Robson about his layoff notice. I credit Logan's account of what was said. Thus, Logan asked whether lack of production actually was a reason for the layoff. Robson orally confirmed what was written on the layoff notice.

Logan credibly testified he had not been criticized, warned, or penalized in any way for poor job performance by any statutory supervisor throughout his entire period of employment. Einhaus and Eskew confirmed neither of them told Logan his performance was unsatisfactory. Also, Lewis testified he had not instructed any supervisor to discuss Logan's alleged poor work with him.

The historical staffing of the mechanic's job (as described hereinabove) shows that from Logan's February hiring until May, there were three mechanics (McMullen, V. Griffin, and Logan); and in May and for the most of June, there were two mechanics (McMullen and Logan) employed on a full-time basis.

In addition, in April, the Employer procured the services of an "outside" mechanic. Thus, Dennis Griffin<sup>12</sup> (herein called D. Griffin) billed the Employer for \$4,714.75 for his mechanic's services performed between April 23 and October 7, inclusive.

Specifically, records in evidence show the following monthly billings by D. Griffin:

April—\$302.75  
May—\$210.00  
June—\$387.00  
July—\$915.00  
August—\$1,570.00

<sup>10</sup> Ten other employees, concededly production, received identical layoff notices that day. All such employees were recalled by February 1981, except that Logan was not offered a job until June 17, 1981. The position offered was within the bargaining unit. It was not for a mechanics' job. Logan did not respond to that offer.

<sup>11</sup> Robson did not testify. Because the record does not show whether Robson was a supervisor at the time of the hearing, I make no adverse inference from his failure to appear as a witness.

<sup>12</sup> Not to be confused with former full-time employee Vern Griffin who had been discharged in May. It is undisputed that D. Griffin worked as an independent contractor.

<sup>9</sup> This aspect of Einhaus' testimony stands uncontradicted.

ably, that employee was a guard. As such, he would have been excluded from the unit. That fact was not sufficient, in *Howell*, to disqualify either the individual or the activity from the ambit of protection afforded by Section 7. See also *Bel-Air Mart, Inc., a Subsidiary of Mammoth Mart, Inc.*, 203 NLRB 339, 341 (1973), enf. 497 F.2d 322 (4th Cir. 1974).

The facts in the case at bar, I conclude, present even more cogent circumstances for finding Logan's (and the Union's) activities protected. If the signing of the check-off card is deemed an effort of Logan to join the Union, he was clearly exercising a right explicitly contained in Section 7. If Logan's efforts are viewed as an attempt to become a unit employee, they similarly are entitled to the mantle of the Act's protection. This is so because, being a unit employee, in the circumstances herein,<sup>15</sup> simultaneously achieves union membership and representation. Thus, either view shows an effort to exercise an explicit statutory right. As such, the activity herein is protected within the meaning of the Act.

**B. Employer knowledge:** The record contains ample evidence of this *prima facie* element. It is uncontradicted that Einhaus was approached by Duncans and Smith about Logan's desire to join the Union. Lewis admitted Einhaus indicated to him Logan's desire to become a member of the bargaining unit. Einhaus testified that he told Robson the Union had presented Logan's union card to him. Finally, each of these events, it is conceded, took place before the decision to terminate Logan.

**C. Unlawful motivation:** Section 8(a)(1) violations support findings of unlawful motivation. I have found, *supra*, that there is no merit to the sole 8(a)(1) allegation that Einhaus unlawfully threatened Logan's discharge.

Nonetheless, the issue is not so easily put to rest. Section 8(a)(1) violations are not necessarily a requirement of an 8(a)(3) finding:

Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such case . . . the trier of fact may infer motive from the total circumstances proved. . . . If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—at least where . . . the surrounding facts tend to reinforce that inference. [*Shattuck Denn Mining Corporation (Iron King Branch)* v. N.L.R.B., 362 F.2d 466, 470, (9th Cir. 1966).]

The *Shattuck Denn* principle was quoted with approval by the Board in *Best Products Company, Inc.*, 236 NLRB 1024, 1025 (1978). See also *Wellington Hall Nursing Home, Inc.*, 257 NLRB 791 (1981).

Support for a finding of unlawful motivation "is augmented [when the explanation of the employer's conduct] offered by the Respondent [does] not stand up under scrutiny." *N.L.R.B. v. Bird Machine Company*, 161 F.2d 589, 592 (1st Cir. 1947).

I conclude that the General Counsel has established the requisite element of antiunion hostility. The follow-

ing factors warrant the inference, which I make, that Logan's discharge was motivated by unlawful considerations.

1. The reasons ascribed to Logan's termination are inconsistent. Robson told Logan his "layoff" was due to reduced production requirements. Lewis and Einhaus testified the sole reason for the termination was poor work performance.

These inconsistent and shifting reasons, as well as the record as a whole, lead me to the conclusion the alleged cause for Logan's termination was pretextual. *PRS Limited, d/b/a F. & M. Importing Co.*, 237 NLRB 628, 632 (1978); *K. T. Metal Finishing d/b/a Electro-Plating Specialties, Inc.*, 236 NLRB 534 (1978). Such shifting reasons support a conclusion that Logan's termination was motivated by unlawful considerations. *Russ Togs, Inc.*, 253 NLRB 767, fn. 2 (1980).

2. The timing of Logan's discharge is coincidental with his attempt to become a unit employee. Viewing the evidence in a light most favorable to the Employer, one must conclude that Logan produced substandard quality work throughout his employment. Indeed, Einhaus repeatedly testified that Logan's work was in a state of deterioration. Each Employer witness testified on this subject case Logan in such uncomplimentary terms.

Despite the above-described scenario depicted by the Employer, absolutely no reprimand, warning, or other disciplinary action was imposed on Logan until after the effort of Smith and Duncans in September to have Logan included in the unit. Lewis' testimony that the termination decision was not made until after the occurrence of Logan's activity found to be protected supports an inference, in the circumstances herein, that it was the interjection of that protected activity which played a part in the decision to terminate Logan. It is simply implausible to believe that Logan's performance was as bad as claimed by the Employer's witnesses, in the absence of any type of discipline imposed upon him.

There is another factor concerning timing. The evidence shows that union representatives had discussions with Einhaus earlier in 1980 regarding the status of mechanics. In each earlier instance, the union representatives had been satisfied with the explanation that the incumbents of the jobs were salaried. It was only when Duncans himself took the liberty to personally examine the timecards that the Employer officials took strong and swift action to solidify their position regarding mechanics. Thus, Einhaus immediately chastised Duncans for having looked at the timecards by telling him such action could lead to his (Duncans') discharge and such matters were none of his business. Later, around the time the decision to terminate Logan was made, a decision also was made to convert the mechanics from hourly to salary paid personnel.<sup>16</sup> The chronology of these events leads me to conclude that the employer representatives were greatly concerned and disturbed over the Union's efforts to include mechanics in its bargaining unit. The

<sup>16</sup> The Employer claims this conversion was part of a yearend evaluation. Assuming this is true, I conclude that the only basis for such conversion of the mechanics, which appears in the record, is the Union's revitalized efforts to have that classification included in its bargaining unit.

<sup>15</sup> Referring to the Union's status as incumbent representative.

Union's efforts apparently were regarded by the Employer as an intrusion on its historical position that mechanics were managerial. The record as a whole, in my opinion, permits the inference that the Employer's opposition to the subject union activity became manifest through its various responses, including Logan's termination.

3. Logan's termination was contrary to past practice. First, Smith testified that in his 27 years of employment it was uncommon to lay off repairmen together with production employees. Those layoff periods normally were an excellent time for the machinery to be repaired. Immediately before his termination, Logan had consistently worked 5-1/2 days each week. That fact tends to show repair work was available. The failure to retain Logan for repair work as was the custom during production layoffs, and in accord with a suggested need for repair services during October, is unexplained in the record.

Also, the precipitous notice of termination given to Logan is contrary to past practice. Thus, when Vern Griffin was discharged for poor work in May, he was provided an explicit and true statement of the reason for his termination; and that explanation was given him 2 weeks in advance of its effective date. Also V. Griffin received a full explanation that he would receive a layoff, not discharge, notice so he could collect unemployment benefits. As shown above, Logan was not given a candid reason by Robson for his termination. Moreover, absolutely no advance notice of the termination was provided to Logan; and no discussion whatsoever was held concerning Logan's entitlement to unemployment benefits.

4. The element of unlawful motivation is virtually admitted. Einhaus testified that he had no personal conversation with Logan regarding Logan's termination. Instead, Einhaus testified he instructed Robson to deliver the layoff notice. Einhaus further testified he instructed Robson to provide Logan with an opportunity to return to work with the Employer as a production employee. In Einhaus' own words, he instructed Robson that Logan could return to work there but "under no circumstances as a Mechanic."

I conclude Einhaus' quoted words are an expression of unlawful motivation. In the entire context of the instant case, those words impart an intention to retaliate against Logan for his protected activity. Even assuming the record shows, contrary to my findings, that Logan's job performance was as unsatisfactory as attributed to him, the quoted words assume an unlawful character. Though it may be argued that those words signify no more than an intention not to place Logan again into a job which he could not properly perform, such an interpretation is tenuous. It is more probable that if the Employer truly considered Logan as a poor worker, Einhaus would have said something to signify Logan would not be employed in any job in the future.

In sum, I find Einhaus' spontaneous exclamation to Robson is tantamount to an admission that Einhaus harbored unlawful motivation in dealing with Logan.

Upon all the foregoing, I conclude that the evidence as a whole demonstrates the true motive for Logan's ter-

mination was to respond to the Union's effort to make Logan a unit employee. As such, the motivation for his discharge is unlawful.

D. *Improper effect*: Finally, I conclude the consequence of Logan's termination reasonably has the proscribed effect of discouraging employee union activity. The termination, having occurred within a brief period of time after the effort to include Logan as a unit employee, surely signaled to other employees the potential risks of seeking union representation. I conclude that this is the type of inhibiting effect the Act is designed to protect against.

## 2. The Employer's defense

I conclude that the Employer's defense does not withstand scrutiny. It is true there is no evidence that the Union generally enjoyed less than harmonious relationships with the Employer. There is no evidence the Employer has a proclivity to violate the Act. Nonetheless, those factors must be balanced against the credited evidence showing antipathy to Logan's attempt to be represented by the Union.

The Employer's reasons presented for Logan's discharge are not convincing. Lewis and Einhaus consistently and persistently testified that Logan's work was unsatisfactory virtually from the outset of his employment. Those generalized appraisals are inconsistent with management's handling of Logan. Thus, Logan received absolutely no written warnings, discipline, or suspensions. Einhaus testified this omission was an act of compassion. Einhaus claimed he did not wish to be harsh with Logan and believed warning him would not serve to improve Logan's skill. However admirable Einhaus' position might be, it is inconsistent with, and in marked contrast to, the way V. Griffin was handled for the same allegedly poor work performance. Thus, Einhaus acknowledged V. Griffin had been warned of potential discipline prior to his discharge in May.

There is yet another flaw in the stated reason for Logan's discharge. As described, *supra*, Logan spoke with Einhaus after McMullen left. Logan wanted to know what would be expected of him in McMullen's absence. Einhaus then did not communicate any concern about Logan's job performance. Instead, as noted, Einhaus said that he would "stick" with Logan. I consider Einhaus' comments the equivalent of a vote of confidence in Logan. In any event, Einhaus' failure to discuss the alleged shortcomings in Logan's work performance with him seriously diminishes the credibility of the Employer's claim that Logan was performing on an unacceptable level.

The defense is pervaded with exaggeration.

Notwithstanding the absence of disciplinary action against Logan, the Employer adduced considerable evidence to show Logan's job performance was below par.

First, as earlier noted, Einhaus testified that he received a report from McMullen to the effect Logan did not possess the necessary skills to be a mechanic. Second, Einhaus made repeated testimonial assertions that Logan's work was unsatisfactory. Einhaus further claimed Logan had not observably improved after his

brief training in Chicago. Also, Einhaus testified Logan's work product deteriorated after McMullen retired.<sup>17</sup>

Third, the Employer adduced considerable evidence to show that skilled mechanics are critical to its operations. I credit all such testimony. It is virtually self-evident that the machinery used by the Employer in its production functions must be in working order to allow the Employer to manufacture its products. In this connection, the Employer sought to show that it experienced a great deal of so-called "down time"<sup>18</sup> because of Logan's inability to repair and maintain the equipment. Thus, Lewis, Einhaus and Eskew mutually testified that they discussed machine breakdowns several times in the period of July through September. In these conversations, the participants claimed they observed to one another that Logan was not able to properly maintain the equipment.

Logan literally acknowledged he could not repair all types of equipment used by the Employer. However, Lewis admitted that "down time" existed for years before Logan was first employed. Also Duncans testified without contradiction, in rebuttal, that he observed no more "down time" during Logan's employment than at any other time. Duncans testified, too, that the same degree of "down time" persisted even after Devine was hired in November.

Accordingly, I find the record shows that "down time" was a chronic problem at the Employer's Taylor facility.<sup>19</sup> On the foregoing, I conclude that the effort to blame Logan for the downtime situation is a blatant effort to exaggerate the Employer's defense against Logan. I conclude the Employer's arguments and implications that "down time" was a problem particularly associated with Logan's poor work are unpersuasive and a gross exaggeration.

The Employer exaggerated the claim that D. Griffin had to be hired because of Logan's bad work. Such a position is based purely on speculation derived from the increased need for repair help after McMullen retired.

The increased billings of D. Griffin do not suffice to prove Logan's work was poor. Griffin's monthly invoice totals (set forth, *supra*) show relatively consistent billings for April through June. Both Logan and McMullen worked during those months. There is substantial increase in the cost of D. Griffin's services in July and August. These increases are consistent with McMullen's retirement and Logan's sole presence as a full-time mechanic.

<sup>17</sup> I find Einhaus' evaluations of Logan's work of little probative value. There was no showing that Einhaus possessed the technical skills as a mechanic to enable him personally to evaluate Logan. Much of Einhaus' testimony on this subject was provided through alleged reports to him by others who did not testify, such as McMullen and D. Griffin; and was couched in broad generalization and conclusory statements.

<sup>18</sup> I use this expression to denote periods when machinery is inoperative awaiting completion of repair work.

<sup>19</sup> The 10 hours each weekday worked by Logan during September, plus the 4 hours each Saturday he worked that month hardly seems consistent with a contention that his work performance was the cause of major production disruptions.

September actually showed a decrease in the cost of D. Griffin's services.<sup>20</sup>

All the Employer's financial evidence concerning the cost of D. Griffin's services were unaccompanied by any hard evidence to show the quality of Logan's work. As noted above, the supervisors who consistently gave testimonial appraisals of Logan's work did so in generalized terms. None was shown to possess the technical expertise to properly or fairly assess Logan's work product.

Even the Employer's own evidence demonstrates exaggeration. Thus, Eskew testified D. Griffin "frequently" had to instruct Logan in his work. That testimony is contrary to D. Griffin's invoices. All those invoices (April-October) are in evidence as Respondent Exhibit 2. Only the invoices dated August 7, September 25, and September 30 contain charges to the Employer for "instruction" or "training" of "Titus" [Logan] by D. Griffin.

Eskew's exaggeration is patent. I concede it is possible D. Griffin gave Logan instructions for which the Employer was not charged. Nonetheless, D. Griffin's failure to have billed the Employer for such other instruction times, if any, in the instant context creates a reasonable presumption that such instruction was minimal and insignificant. In concluding this issue was exaggerated, I have also considered that the dates when the hard evidence positively proves D. Griffin gave instructions to Logan do not at all coincide with the highly self-serving assertions of the Employer witnesses that Logan's work was consistently poor and deteriorated.

Eskew's testimony reflects still further exaggeration. The thrust of Eskew's direct testimony was to portray Logan as an incompetent repairman. During redirect examination, Eskew emphasized that point. She claimed that D. Griffin complained to her [Eskew] "about the lack of ability" on Logan's part. Despite all this, Eskew admitted (during recross examination) that she had not reported to Lewis, Einhaus, or Robson the alleged complaints of D. Griffin about Logan. This admission, I conclude, casts doubt upon the integrity of the Employer's claims that Logan's work was so poor it required his discharge. I consider this testimony, also, a further example of exaggeration in the defense.

Analysis of the monthly cost of D. Griffin's services shows a tendency to enhance the General Counsel's contention that the timing of Logan's termination is directly related to the activities found to be protected.

The fiscal statistics show the greatest expenditure for D. Griffin's services (1) coincided with Lewis' directive to do all the repair work with the Employer's own employees and (2) that it was incurred *before* Duncans' request to place Logan in the unit.

Both these circumstances provided an immediate opportunity for the Employer to rid itself of Logan. However, the Employer retained him. It is improbable that the Employer would have countenanced both the asserted unsatisfactory work of Logan *and* the severely increased cost of independent contractor services which

<sup>20</sup> I will not speculate as to the reason for this decrease. However, it is interesting to note that this decrease coincided with the heavy 6-day work schedule of Logan during that month.

the Employer, in its defense of the instant action, claims was caused by that same poor employee. I conclude the failure to have taken action against Logan at that time, specifically before September, tends to vitiate the Employer's defense.

The defense was not presented with candor.

During his direct testimony, Lewis testified, *inter alia*, that mechanics are salaried. Literally, that statement was true as of the date of Lewis' testimony.

However, as earlier observed, the record actually shows that mechanics V. Griffin, McMullen, Thomas, and Devine were hourly paid. It was not until November 7 that the job was converted to a salary basis.

Lewis impressed me as an articulate and intelligent individual. He is clearly capable of making the distinctions necessary by his interrogation. I consider this testimonial distortion to impact adversely upon the validity of the Employer's defense. This is an example of an effort to mask the true facts. It renders suspect other generalized and unsupported assertions made by Lewis in particular.

The foregoing analysis of the discrimination issue persuades me that the Employer has not shown it had good reason, sufficient in itself, to discharge Logan. I conclude there is insufficient evidence to effectively rebut the General Counsel's *prima facie* case. That *prima facie* case, in its totality, leads me to conclude the Employer's defense is a pretext.

Assuming, *arguendo*, that Logan's performance was substandard, the question is: What is it that distinguishes his job performance in September and October from that which the Employer asserts was unsatisfactory during the preceding months? There is no showing that Logan's work was poorer in September than earlier. Indeed, the largest sum of money paid to D. Griffin was for August.

I conclude the record as a whole contains substantial evidence to warrant a finding that the distinguishing characteristic was the interjection of the attempt to make Logan a unit employee. Thus, it is plain that Logan's purported poor job performance became intolerable only after he had been associated with the protected activity. In this backdrop, his discharge is unlawful in violation of Section 8(a)(3). See *N.L.R.B. v. Electric City Dyeing Co.*, 178 F.2d 980 (3d Cir. 1950), *enfg.* 79 NLRB 872 (1948). I so find. I further conclude that there is no convincing, cogent, and credible evidence to show Logan's dismissal was because of poor job performance or that the Employer would have discharged him, absent the attempt to make him a unit employee. See *Quinn Broadcasting Corp. of San Juan d/b/a WQBS-AM Radio Station "La Gran Cadena"*, 254 NLRB 900 (1980), reconsidering 241 NLRB 318 (1979).

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

#### CONCLUSIONS OF LAW

1. Sealy Mattress Company of Michigan, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer did not interfere with, restrain, and coerce employees in violation of Section 8(a)(1) of the Act when Einhaus said that Logan would be fired if he became a mechanic in the bargaining unit.

4. The Employer unlawfully discriminated against its employees in violation of Section 8(a)(3) and (1) of the Act when it terminated the services of employee Titus Logan on October 7, 1980.

5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Employer violated Section 8(a)(3) and (1) of the Act, I shall recommend that it cease and desist therefrom and affirmatively take such action as will dissipate the effects of its unfair labor practices.

Having found that Titus Logan was unlawfully terminated on October 7, 1980, I find it necessary to order the Employer to offer him full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he suffered as a result of the Employer's unlawful actions. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest computed in the manner and amount prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Inasmuch as the record contains no evidence of a proclivity to violate the Act, I conclude it is not necessary that the Order contain broad proscriptive language. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). However, the Employer shall be ordered to refrain from, in any like or related manner, interfering with, restraining, and coercing its employees in the exercise of their Section 7 rights.

[Recommended Order omitted from publication.]